

May 10, 2007

Ms. Patricia Kough
P.O. Box 9
Bethel, DE 19931

**RE: Freedom of Information Act Complaint
Against Town of Bethel**

Dear Ms. Kough:

On February 20, 2007, our Office received your complaint alleging that the Town of Bethel ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C. Ch. 100* ("FOIA"), by not providing the public with timely notice of a meeting held on February 14, 2007.

By letter dated February 21, 2007, our Office asked the Town to respond to your FOIA complaint in writing by March 5, 2007. Because the Town recently retained a new attorney, our Office granted his request for a brief extension of time to respond to your complaint. Our Office received the Town's initial response on March 12, 2007. On March 13 and 15, 2007, our Office asked the Town for additional information which we received by April 9, 2007.

According to the Town, elections for two positions on the Town Council (President and President Pro Tempore) were scheduled for February 24, 2007. According to the Town, two members of the Council contacted the Town's attorney on February 12, 2007 "concerning the Town Charter Section 5 requirement for election officials for municipal elections" because the "Council had not, in recent years, appointed an election committee." According to the Town, the Town's attorney advised the Council that it should schedule a "special emergency" meeting as quickly as possible to appoint an Elections Committee so that the Committee would have sufficient time before the February 24, 2007 elections to advise the public about election procedures.

The Town provided us with a copy of the notice and agenda for a "Special Emergency Meeting" of the Town Council scheduled for 7:30 p.m. on Wednesday, February 14, 2007. The agenda listed for discussion, "Select Pursuant to Section 5 Three (3) Election Officials for the Up Coming Election." The Town also provided us with an affidavit from Councilman William Rutledge who states that he posted the notice and agenda for the February 14, 2007 meeting at: "the Town Bulletin Board; the Bethel Post Office; the General Store; the Bethel Town Community Center, where the Town holds its regularly scheduled meetings; and at several other places in Town including several telephone poles." According to the Town, Mr. Rutledge posted approximately fifty of those notices on February 12, 2007 between 5:30 and 6:30 p.m.

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA requires public bodies to "give public notice of their regular meetings and of their intent to hold an executive session closed to the public at least 7 days in advance thereof. The notice shall include the agenda," *Id.* §10002(e)(2).

FOIA permits a public body to give shorter notice for a special meeting "but in any event no later than 24 hours before such meeting." *Id.* §10004(e)(3). "The public notice of a special . . . meeting shall include an explanation as to why [seven days' notice] could not be given." *Id.*

FOIA does not require public notice for "any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety," *Id.* §10004(e)(1).

LEGAL ANALYSIS

A. Emergency Meeting

In *Att'y Gen. Op.* 97-IB18 (Sept. 2, 1997), the Town of Bridgeville posted notice three days before a meeting scheduled for June 30, 1997 to discuss a personnel matter in executive session. The personnel matter concerned the chief of police who claimed Bridgeville had violated his rights under the policeman's bill of rights. After the executive session, Bridgeville authorized its attorney to write a letter to the Attorney General requesting an investigation of the chief of police.

Bridgeville contended that the June 30, 1997 meeting was an emergency meeting for which

FOIA did not require public notice because it was "necessary for the immediate preservation of the public peace, health or safety." 29 *Del. C.* §10004(e)(1). Our Office disagreed. "We do not believe that the circumstances surrounding the dispute between [Bridgeville and the police chief] so threatened the public peace, health or safety as to obviate the notice requirements of FOIA." *See also Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (approval of a construction contract change order was not necessary "for the immediate preservation of the public peace, health or safety").

In *Att'y Gen. Op.* 04-IB17 (Oct. 18, 2004), the New Castle County Council met without notice to the public to consider lending money to the City of Wilmington for police services. Our Office acknowledged "that there was a sense of urgency back in July 2004 to resolve the law enforcement crisis in the City of Wilmington." However, "we believe that a public body can invoke the emergency meeting exception of FOIA only when the matter is so urgent that it must be addressed in less than twenty-four hours. Otherwise, FOIA requires a public body to call a special meeting with 24-hours' notice to the public with a brief explanation why the normal seven-days' notice to the public could not be given."

In *Att'y Gen. Op.* 04-IB17, our Office determined that the County Council violated FOIA because its "Public Safety Committee had adequate time to notice a special meeting to begin preliminary discussion of allocating money to the City of Wilmington for law enforcement. The Council posted notice of its first public meeting on the issue ten days in advance (on July 16, 2004). If the City of Wilmington law enforcement crisis required earlier discussion prior to that meeting, the Council could have noticed a special meeting with only 24-hours' notice."

The Town provided our Office with a copy of the Town Charter. Section 5 of the Charter provides:

An election shall be held in said Town for elective officers on the last Saturday of February in each year from one to four o'clock in the afternoon, and at such place as shall be determined and fixed by the Town Council. At least ten days previous thereto, due notice thereof shall be given by said Town Council. At such election the votes shall be received by the State's Justice of the Peace residing in said Town, or by such other person as said Town Council may select, and the result of the balloting for said officers shall be ascertained by him and two competent citizens, qualified as voters of said Town, selected by said Town Council to assist in holding such election.

The Town contends that the February 14, 2007 meeting was "of an emergency nature so as to not postpone or cause a cancellation of the [February 24, 2007] election." It is not clear to us how the appointment of an Elections Committee by the Town was "necessary for the immediate preservation of the public peace, health of safety," 29 *Del. C.* §10004(e)(1), particularly since the elections were still ten days away. However, as in *Att'y Gen. Op.* 04-IB11, our Office does not have to decide whether a true state of emergency existed in this case. A public body can invoke the emergency meeting exception of FOIA only when the matter is so urgent that it must be addressed in less than twenty-four hours. Here, the issue of election officials came up two days before the meeting called by the Council for February 14, 2007 to appoint those officials so there was sufficient time for the Town to notice a special meeting under FOIA with at least twenty-four hours' notice.

Our legal analysis therefore turns to FOIA's requirements for a special meeting, which are less stringent than the requirements for an emergency meeting without any public notice.

B. Special Meeting

"Our Office has interpreted the shorter [24-hour] notice period allowed by FOIA for a special meeting to require some showing of an 'exigent circumstance or compelling need' for the public body to hold a special meeting to discuss a matter of public business." *Att'y Gen. Op.* 05-IB05 (Feb. 22, 2005) (quoting *Att'y Gen. Op.* 00-IB07 (Apr. 28, 2000)).

In *Att'y Gen. Op.* 05-IB05, our Office determined that there was no evidence in the record "to suggest that there were any exigent circumstances or compelling need for the Town Council to meet on three days' notice to discuss firing the Town Solicitor."

In *Att'y Gen. Op.* 04-IB02 (Jan. 28, 2004), our Office determined that the City of Newark "has shown exigent circumstances or compelling need to hold a special meeting . . . After the Chancery Court's decision . . . the City was faced with exigent circumstances which could not wait to be addressed until the next regular meeting of the City Council . . . The City took immediate steps to place a temporary moratorium on the issuance of new rental permits so as not to violate state law."

We believe there was a compelling reason for the Town to call a special meeting to appoint an Elections Committee and the Town posted public notice of that special meeting at least 24 hours in advance as required by FOIA. With the upcoming elections imminent, the Town wanted to give

the new Elections Committee sufficient time to meet and advise the public about election procedures with which they might not be familiar because there had not been a contested election for several years.¹

The notice of the special meeting, however, did not "include an explanation as to why [seven days' notice] could not be given." 29 *Del. C.* §10004(e)(3). Our Office determines that the Town violated FOIA when it posted a notice for a special meeting two days in advance without including a brief explanation why the Town could not give the public seven days' notice. *See Att'y Gen. Op.* 05-IB21 (Aug. 1, 2005) (notice of 'special meeting did not state an explanation why seven-days' notice could not be given'") (quoting *Att'y Gen. Op.* 04-IB01 (Jan. 28, 2004)); *Att'y Gen. Op.* 94-IO37 (July 26, 1994) (notice of special meeting failed "to provide any explanation whatsoever concerning the reason why the normal seven day notice could not be given").

Our Office does not believe remediation is required for this FOIA violation. The Town Charter authorized the Council to appoint an Elections Committee and the Town posted timely public notice of the February 14, 2007 special meeting at least twenty-four hours in advance as required by FOIA. The Town had a compelling reason to hold a special meeting to appoint an

¹ Section 5 of the Town Charter only authorizes the Elections Committee to count ballots. When the issue came up on February 12, 2007, the Town still had time to give seven days' notice to the public of a meeting to appoint an Elections Committee before the February 24, 2007 elections. The Town contends time was of the essence because the Committee also had to review the nominations (required by the Charter to be filed ten days prior to the elections) and compile a voter registration list. Whether those delegated duties were *ultra vires* is outside our jurisdiction under FOIA.

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Elections Committee as far ahead of the February 24, 2007 elections as possible to advise the public about election procedures. Under these circumstances, we do not believe that requiring remediation would serve any purpose at this time because the elections are now over and we are not aware of any challenge to the counting of the ballots.

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CONCLUSION

For the foregoing reasons, our Office determines that the Town complied with FOIA by giving the public at least twenty-four hours' notice of a special meeting held on February 14, 2007. The record shows there was a compelling reason for the Town to give less than seven days' notice of the meeting because of the upcoming contested elections to the Town Council.

Our Office determines that the Town violated FOIA by not including in the notice for the February 14, 2007 special meeting a brief explanation why the Town could not give seven days' notice. We do not believe any remediation is necessary for that violation because remediation would not serve any purpose at this time.

The Town is warned to strictly comply with the open meeting requirements of FOIA in the future.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
Attorney General

Richard S. Gebelein, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

John E. Tarburton, Esquire
Town Solicitor

Mary Ann Haley
Opinion Coordinator